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No. 30

In the

Supreme Court of the United States

OCTOBER TERM, 1965

JOHN PINKOWSKI,

Petitioner,

vs.

RALPH COGLAY, doing business as MOHAWK EQUIPMENT COMPANY,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CITATIONS.

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RALPH COGLAY, doing business as MOHAWK EQUIPMENT COMPANY,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner John Pinkowski, a citizen of Illinois, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter the "Court of Appeals") entered May 24, 1965 reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in favor of John Pinkowski and against Ralph Coglay, doing business as Mohawk Equipment Company, a citizen of Massachusetts in the amount of Seventy Five Thousand Dollars ($75,000.00) and remanding said cause to the District Court for the entry of judgment in favor of Mohawk Equipment Company and against John Pin-

kowski, and the further order of the Court of Appeals denying the petition for rehearing.

CITATIONS TO OPINIONS BELOW.

The Memorandum Opinion of the District Court is printed in the Appendix hereto (A. 1a). The opinion of the Court of Appeals under the title *Pinkowski* v. *Mohawk Equipment Company* is reported at 347 F2d 411 (1965), and is printed in the Appendix hereto (A. 6a).

JURISDICTION.

The judgment of the Court of Appeals was entered on May 24, 1965 (A. 6a). The order denying Petition for Rehearing was entered on July 8, 1965. Timely applications for extension of time within which to file a petition for writ of certiorari were presented to the Honorable Tom C. Clark, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit and his orders granting extension to November 20, 1965 were entered on October 5, 1965 (A 15a) and on November 4, 1965 (A 16a).

QUESTIONS PRESENTED.

I.

May a Court of Appeals redetermine facts found by a jury?

II.

In deciding whether there is any evidence to support a jury Verdict for a plaintiff may the Court of Appeals look at the facts only from the standpoint of the defendant's theory of the case?

STATEMENT OF THE CASE.

Pinkowski sued Arthur & Nelson d/b/a Arnel Trading, Ralph Coglay d/b/a Mohawk Equipment Company and Fred Keefe in this diversity action, alleging that the negligence of Keefe caused the amputation of Pinkowski's leg.

The evidence was that Keefe was an experienced truck driver, that Mohawk owned a tractor, that Arnell had trailers, and fish that it wanted delivered to Chicago. The three entered into an agreement that Keefe would drive Mohawk's tractor to haul Arnell's trailers and deliver the fish.

Keefe, therefore, supplied the skill and knowledge in the operation of the unit, Mohawk supplied the tractor, Arnel supplied the ICC permit and the trailer and the fish were delivered.

In the course of unloading in Chicago, Keefe's negligence caused the injury.

During trial the defendants, Keefe and Arnell, entered into a covenant with plaintiff and the case went to a jury verdict against Mohawk on the theory that Keefe was the agent of or a joint adventurer with Mohawk.

Mohawk's post trial motion asked for judgment N.O.V. or in the alternative, for a remittitur to give effect to the payment under the covenant with Keefe and Arnel.

The motions were denied and judgment was entered on the verdict, and on Mohawk's appeal the Court of Appeals, Seventh Circuit, reversed and remanded for judgment for Mohawk, holding as a matter of law that the facts did not show a joint venture.

REASONS WHY THE WRIT SHOULD BE GRANTED.

THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS OPINION AND VIEW OF THE FACTS FOR THAT OF THE JURY.

The jury was given evidence as to the arrangements between the parties, the part to be played by each in the joint operation of getting fish to market so that each would gain something. From this evidence the trial court said:

> "From these facts the jury could reasonably infer that Keefe was either the agent of Coglay or that all the defendants were engaged in a joint venture. It is not the province of the Court to disturb a jury verdict when, as in the case at bar, it is supported by ample evidence."

Keefe summed it up as follows:

> "I was satisfied to continue with that (arrangement) because I felt it was easier on me than hauling steel. Coglay was satisfied with that. He was paying his notes and even if he weren't getting rich he was at least building some equity in his truck. Arnel was satisfied, the fish were being delivered and everyone was getting along fine."

The Court of Appeals reviewed the same evidence and held as a matter of law that there was no joint enterprise. As to the language of Keefe quoted above, the Court of Appeals said: "In our opinion, this statement clearly shows a divergence of interests." But the 7th Amendment does not allow such a re-examination of the facts, does not allow a Court to substitute its opinion for that of a jury except by the rules of common law.

As this Court has said:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."
>
> *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 US 355, 7 L ed 2d 798, 82 S Ct. 780, reh den 369 US 882, 8 L ed 2d 284, 82 S Ct 1134 (1962)

This rule should apply with special force in an area of substantive law where the Court of Appeals itself recognized that:

> ". . . courts have not laid down an exact definition of what amounts to a joint adventure inasmuch as the answer depends largely upon the terms of the particular agreement, upon the construction which the parties have given it, and upon the nature of the undertaking as well as other facts. The most that can be done, it is said, is to point out certain general characteristics of the relationship of joint adventurers, and certain elements which are generally regarded as essential thereto." (A 8a)

In other words, these are questions of *fact* which the common law has traditionally left to the fact finder—the jury—to decide!

These parties were not strangers. They were jointly engaged in a project and thereby gave rise to some sort of legal relationship. There was evidence from which the jury could have decided that the relationship was one of agency or of joint venture. The Court of Appeals thought it was neither, it may well have thought that

Keefe was an independent contractor. But the process of viewing the evidence to make any such conclusion is precisely the function of the jury and not that of the Court.

II.

IN REVIEWING THE EVIDENCE THE COURT OF APPEALS ADOPTED THE DEFENDANTS THEORY OF THE CASE.

The proper Illinois Rule to be applied in considering evidence as a motion for judgment N.O.V. is set out in the memorandum opinion of the trial court:

> "The Court will first consider the motion for judgment N.O.V. In passing on such a motion, the Court must consider the testimony in the light most favorable to plaintiff, resolve all conflicts in the plaintiff's favor, and give plaintiff the benefit of every fact which may reasonably be deduced from the evidence, *Delaware and H. R. Corp.* v. *Bonzik,* 105 F. 2d 341. This rule prevails in Illinois. As stated in *Hulke* v. *International Manufacturing Company,* 13 Ill. App. 2d 571, 142 N.E. 2d 717:
>
> > 'On motion for judgment notwithstanding the verdict, or for a directed verdict, the court does not weigh the evidence. The court may properly consider only the evidence and inferences most favorable to the plaintiff; and it is only where there is no evidence tending to prove plaintiff's case that the court can grant either a motion for directed verdict, or judgment, notwithstanding the verdict. *Lindroth* v. *Walgreen Co.,* 407 Ill. 121, 130, 94 N.E. 2d 847; *Beverly* v. *Central Illinois Elec. & Gas Co.* . . .' "

The Court of Appeals here concentrated on the unloading of the fish and the control exercised of that particular sub-operation by Mohawk. This was too fine a distinction

when *all the facts* are viewed in the light *most favorable to plaintiff*, and in the light of plaintiff's theory of the case.

It was plaintiff's theory, to be sure, that the delivery of the fish was the end result desired by all the participants in this undertaking, but that to accomplish that result each contributed something by way of money, equipment, or skill and experience; that each had control over various aspects and that jointly they controlled the venture. The Court of Appeals in its opinion says that there was no "right of Mohawk to direct and govern the conduct of Keefe in the delivery of the fish" but the discussion of the concept of joint venture that the Court of Appeals quotes from the Illinois case of *Carrol* v. *Caldwell,* 12 Ill 2d 487, 147 N.E. 2d, 69 (1958) does not contain such a narrow concept but talks instead of a right to direct and govern the policy in connection with the community of interest in the performance of a common purpose.

This court has held that:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co.* v. *McDade,* 135 U.S. 554, 571, 572; *Tiller* v. *Atlantic Coast Line R. Co., supra,* 68; *Bailey* v. *Central Vermont Ry.,* 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation

> or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 35.

And in the more recent case of *Atlantic & Gulf Stevedors* v. *Ellerman Lines*, 369 U.S. 355, Reh den 369 U.S. 882 (1962), this court said at page 364:

> "If that was the jury's view of the facts, then Petitioner plainly would not be liable under its warranty. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment. *Arnold* v. *Panhandle & S.F. R. Co.*, 353 U.S. 360."

The best illustration that the fact situation in this case was peculiarly one for the determination of the jury is in the difficulty encountered in finding case decisions explicitly defining the concept of joint adventure. The Illinois decision quoted by both parties in this case and by the Court of Appeals illustrates that the Illinois law recognizes that there are no hard and fast rules. In 3 Am Jur 2d under the title of Agency, the authors attempt to distinguish certain other relationships from that of agency. In Section 4 of said title on page 421, the following is found:

> "The relation of agency is to be distinguished from that of joint adventure, which signifies a special combination or association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. If, then, the relation between

> the parties, in addition to the usual incidents of an agency relationship and the representation of one party to the relation by the other, embraces also the elements incident to a joint adventure—that is, the combination of the money, property, and services of the parties, together with their sharing in the profits and losses of the transaction involved—the relation thus constituted is one of joint adventure, and not merely that of principal and agent."

Again illustrating that under the common law as followed in Illinois and as binding on the Court of Appeals in this diversity action, the question presented was traditionally one for the decision of the jury.

It is respectfully suggested that the Court of Appeals was searching the record for facts contrary to the verdict when it said (A 10a), "The following facts demonstrate that Mohawk had no control . . ." when the Constitution and the Common Law require that the record be searched for facts that *support the verdict.*

This case involves not a question of the delivery of fish but one of the extent of authority of the United States Courts of Appeals.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that this Court grant the Writ of Certiorari requested by the Petitioner.

Respectfully submitted,

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